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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JOEL GAMBORD, as Trustee, etc.,

Plaintiff and Respondent,

v.

GALLI PRODUCE COMPANY et al.,

Defendants and Appellants.

H043872

(Santa Clara County
Super. Ct. No. 1-11-CV192674)

I. INTRODUCTION

Appellant Galli Produce Company (Galli Produce) leased a warehouse in San Jose from respondent Gambord Trust Properties¹ under a written lease agreement.² In the underlying action, Gambord Trust Properties sought payment of unpaid rent from Galli Produce, which Galli Produce believed had been forgiven and Gambord Trust Properties believed had been deferred. (*Gambord I, supra*, H039760.) After a court trial, Gambord Trust Properties was awarded significantly less than its more than \$200,000 claim for

¹ The record reflects that the full name of respondent is Joel & Dena Gambord Charitable Remainder Trust doing business under the name Gambord Trust Properties (hereafter, Gambord Trust Properties).

² We take judicial notice of this court's opinion in the previous appeal in this matter (*Gambord v. Galli Produce Company* (May 26, 2015, H039760) [nonpub. opn.] (*Gambord I*)). Some background facts and procedural history have been taken from our previous opinion.

unpaid rent. Gambord appealed and this court affirmed March 1, 2013 judgment in the amount of \$36,390 plus prejudgment interest of \$8,821.79. (*Gambord I, supra*, H039760.) In postjudgment proceedings, Gambord Trust Properties was awarded a portion of its attorney's fees through trial as the prevailing party in this contract action.

In the present appeal, Galli Produce seeks reversal of the trial court's December 15, 2015 order denying its motion for attorney's fees on appeal. The attorney's fee provision in parties' lease agreement states in pertinent part: "If either party or the broker named herein brings an action to enforce the terms hereof or declare rights hereunder, the prevailing party in any action, on trial or appeal, shall be entitled to his reasonable attorney's fees to be paid by the losing party as fixed by the court."

The trial court rejected Galli Produce's contention that "a party to a lease may be a prevailing party at trial, and another party may be the prevailing party at appeal." Under Civil Code section 1717,³ the statute governing an award of attorney's fees in a contract case, the trial court ruled that Gambord Trust Properties was the prevailing party in this case and therefore Galli Produce could not recover attorney's fees on appeal. For reasons that we will explain, we agree with the trial court and therefore we will affirm the trial court's December 15, 2015 order.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Action

Appellant Galli Produce Company (Galli Produce) leased a warehouse in San Jose from respondent Gambord Trust Properties under a written lease agreement. Gambord

³ All further statutory references are to the Civil Code unless otherwise indicated. Section 1717, subdivision (a) provides: "[i]n any *action on a contract*, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the *party prevailing on the contract*, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Italics added.)

Trust Properties agreed to several rent reductions that were requested by Galli Produce. The oral rent reduction agreements were silent as to whether payment of the full amount of the rent due under the written lease agreement had been forgiven or deferred.

Gambord Trust Properties eventually objected to the reduced rent payments and demanded that Galli Produce pay the full amount of the rent due under the written lease agreement. After Galli Produce refused, Gambord Trust Properties filed an action against Galli Produce and the individual lease guarantors seeking recovery of more than \$200,000 in unpaid rent.

Following a court trial, the trial court determined that Gambord Trust Properties was precluded from recovering unpaid rent for the periods in which Gambord Trust Properties accepted reduced rent payments from Galli Produce without objection. The trial court further ruled that Galli Produce owed unpaid rent and property taxes in the total amount of \$36,390 for the periods in which Galli Produce paid reduced rent over Gambord Trust Properties' objection.

Gambord Trust Properties appealed from the March 1, 2013 judgment in its favor in the amount of \$36,390 plus prejudgment interest of \$8,821.79. (*Gambord I, supra*, H039760.) In its briefing, Gambord Trust Properties stated that the appeal was “ ‘[o]nly as to the basis for calculating damages, and amounts awarded in damages and prejudgment interest.’ ” This court affirmed the judgment and directed that each party was to bear its own costs on appeal. No issue with respect to attorney's fees was raised in *Gambord I, supra*, H039760.

B. Postjudgment Proceedings Regarding Attorney's Fees

Following the entry of judgment on March 13, 2013, Gambord Trust Properties filed a memorandum of costs that included a request for attorney's fees in the amount of \$78,931.75 for fees incurred in enforcing Gambord Trust Properties' rights under the lease agreement, from pre-lawsuit through trial and posttrial. Galli Produce filed a memorandum of points and authorities in opposition, arguing, among other things, that

Gambord Trust Properties' partial success at trial, in which it had obtained less than 20 percent of its claim for unpaid rent, rendered Galli Produce the prevailing party and barred Gambord Trust Properties' request for attorney's fees.

In its order of May 31, 2013, the trial court ruled that Gambord Trust Properties, not Galli Produce, was the prevailing party entitled to reasonable attorney's fees. After imposing a \$10,000 reduction in the request for pretrial attorney's fees, the court awarded Gambord Trust Properties attorney's fees in the total amount of \$67,161.75. Galli Produce did not seek appellate review of the May 31, 2013 attorney's fees order.

C. Attorney's Fees on Appeal

In September 2015 Galli Produce brought a motion for an order "fixing amount of attorney's fees on appeal" in the amount of \$27,481. Galli Produce argued that it was entitled to an award of attorney's fees incurred as the prevailing party in Gambord Trust Properties' unsuccessful appeal in *Gambord I, supra*, H039760, pursuant to the attorney's fees provision in the parties' lease agreement. The basis for Galli Produce's argument was its interpretation of language in the attorney's fees provision, which Galli Produce asserted entitled it to attorney's fees as the prevailing party on appeal, even though Gambord Trust Properties had been deemed the prevailing party at trial. In an abundance of caution, Galli Produce also filed a memorandum of costs seeking the same of amount of attorney's fees on appeal, \$27,481.

Gambord Trust Properties filed opposition to Galli Produce's motion for attorney's fees on appeal, maintaining that the language of the attorney's fees provision did not entitle Galli Produce to attorney's fees as the prevailing party on appeal. Gambord Trust Properties explained that since the litigation had concluded with Gambord Trust Properties obtaining a net monetary judgment against Galli Produce, only Gambord Trust Properties could be deemed the prevailing party entitled to attorney's fees under the lease agreement. Responding to Galli Produce's memorandum of costs,

Gambord Trust Properties filed a motion to tax costs in which it made the same arguments.

In its order of December 15, 2015, the trial court stated that the issue was whether under section 1717 “a party to a lease may be a prevailing party at trial, and another party may be the prevailing party at appeal.” The court determined that Gambord Trust Properties was the prevailing party for purposes of an award of attorney’s fees, as defined by section 1717, since it had “recovered greater relief in the contract case.” The court therefore denied Galli Produce’s motion for attorney’s fees on appeal and granted Gambord Trust Properties’ motion to tax costs in the amount of \$27,481.

Galli Produce filed a timely notice of appeal from the December 15, 2015 order. The order is separately appealable as a postjudgment order. (See Code Civ. Proc., § 904.1, subd. (a)(2); *Golightly v. Molina*, (2014) 229 Cal.App.4th 1501, 1520.)

III. DISCUSSION

On appeal, Galli Produce contends that the trial court erred in denying its motion for attorney’s fees on appeal because (1) Code of Civil Procedure sections 1021 and 1033.5 authorize the parties to agree to the mode and manner of the compensation of attorneys; (2) the plain language of the attorney’s fees provision states the parties’ agreement to separate awards of attorney’s fees to the party prevailing on appeal and to a different party prevailing at trial; (3) Galli Produce was the party prevailing on appeal since it defeated Gambord Trust Properties’ claim to additional rent payments; (4) to deny Galli Produce its attorney’s fees for successfully defending a contract claim on appeal violates the mutuality of remedy that is codified in section 1717; and (5) it is inequitable to make Galli Produce pay attorney’s fees to defend Gambord Trust Properties’ unsuccessful appeal seeking more damages than were awarded at trial.

The parties correctly agree that this court’s allocation of costs in the disposition in *Gambord I, supra*, H039760, directing each party to bear its own costs, does not preclude

an award of attorney's fees on appeal. (See Cal. Rules of Court, rule 8.278(d)(2)⁴; *Stratton v. Beck* (2018) 30 Cal.App.5th 901.)

We begin our analysis of Galli Produce's contentions with an overview of the legal principles governing the award of attorney's fees in an action on a contract.

A. General Legal Principles Governing Attorney's Fees in an Action on a Contract

As we have noted, the attorney's fees provision in the parties' lease agreement states in pertinent part: "If either party or the broker named herein brings an action to enforce the terms hereof or declare rights hereunder, the prevailing party in any action, on trial or appeal, shall be entitled to his reasonable attorney's fees to be paid by the losing party as fixed by the court."

"California follows what is commonly referred to as the American rule, which provides that each party to a lawsuit must ordinarily pay his [or her] own attorney fees. [Citations.]" (*Trope v. Katz* (1995) 11 Cal.4th 274, 278 (*Trope*)). "Although Code of Civil Procedure section 1021 gives individuals a rather broad right to 'contract out' of the American rule by executing such an agreement, these arrangements are subject to the restrictions and conditions of section 1717 in cases to which that provision applies. [Citations.]" (*Id.* at p. 279.) Therefore, "[p]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract." [Citation.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 (*Santisas*)).

Where the litigation sounds in contract, section 1717 governs a party's entitlement to attorney fees. (*Santisas, supra*, 17 Cal.4th at p. 615.) Section 1717 provides that, "[i]n any *action on a contract*, where the contract specifically provides that attorney's fees and

⁴ California Rules of Court, rule 8.278(d)(2) states: "Unless the court orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under rule 3.170."

costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the *party prevailing on the contract*, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (§ 1717, subd. (a)(1), italics added.)

"The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions." (*Santisas, supra*, 17 Cal.4th at p. 610.) For example, if a contract provides the right to attorney's fees to one party, but not to the other party, "the effect of section 1717 is to allow recovery of attorney fees by whichever contracting party prevails, 'whether he or she is the party specified in the contract or not' (§ 1717, subd. (a))." (*Id.* at p. 611.)

B. Analysis

We understand Galli Produce's primary argument on appeal to be as follows: the parties validly agreed that the party prevailing on appeal could be awarded attorney's fees under Code of Civil Procedure sections 1021 and 1033.5, as shown by the plain language of the attorney's fees provision in their lease agreement awarding attorney's fees to "the prevailing party in any action, on trial or appeal." According to Galli Produce, this language means that separate awards of attorney's fees can be made to the party prevailing on appeal and to a different party prevailing at trial. For several reasons, we find no merit in this argument.

First, section 1717 does not authorize the parties to agree to more than one prevailing party in a contract action for purposes of attorney's fees. "[T]he definition of 'prevailing party' in [section] 1717 is mandatory and cannot be altered or avoided by contract Contractual provisions that conflict with the 'prevailing party' definition under section 1717 are void." (*Excess Electronix v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 707.)

Section 1717 expressly defines “the party prevailing on the contract” as “the party who recovered a greater relief in the action on the contract.” (*Id.*, subd. (b)(1).) The California Supreme Court has instructed that “[t]he *prevailing party determination is to be made only upon final resolution of the contract claims* and only by ‘a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.’ [Citation.]” (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876, italics added (*Hsu*)). In other words, the party entitled to attorney’s fees in an action on a contract “will ultimately be the overall victor.” (*DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968, 977 (*DisputeSuite*)).

Therefore, “section 1717 does not support an award to the prevailing party on appeal, but only to the prevailing party in the lawsuit. [Citations].” (*Wood v. Santa Monica Escrow Co.* (2009) 176 Cal.App.4th 802, 808; see also *Mustachio v. Great W. Bank* (1996) 48 Cal.App.4th 1145, 1150 [plaintiff whose claim for punitive damages was rejected on appeal was the prevailing party under § 1717 because she was ultimately awarded damages on her breach of contract and conversion claims].) Accordingly, Galli Produce is not entitled to contract attorney’s fees on the ground that it was the prevailing party on appeal.

Second, “in deciding whether there is a ‘party prevailing on the contract,’ the trial court is to compare the relief awarded on the contract claim or claims with the parties’ demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.” (*Hsu, supra*, 9 Cal.4th at p. 876.) Section 1717 “vests the trial court with discretion in making the prevailing party determination.” (*Hsu, supra*, at p. 871.) On appeal, “ ‘ “[s]uch a determination will not be disturbed on appeal absent a clear abuse of discretion.” ’ [Citation.]” (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 349.)

Here, the trial court determined that Gambord Trust Properties was the prevailing party for purposes of an award of attorney’s fees, as defined by section 1717,

subdivision (b)(1),⁵ since it had “recovered greater relief in the contract case.” In the underlying action, Gambord Trust Properties sought recovery of more than \$200,000 in unpaid rent from Galli Produce, which Galli Produce believed had been forgiven when Gambord Trust Properties agreed to several rent reductions. Gambord Trust Properties obtained what may be fairly termed a partial victory, consisting of a judgment in the total amount of \$36,390 plus prejudgment interest of \$8,821.79.

Although the total amount of damages Gambord Trust Properties was awarded at trial was significantly less than the amount it had demanded for Galli Produce’s unpaid rent, it was still “within the discretion of the trial court to determine which party prevailed on the contract” where, as in this case, none of the parties appeared to achieve a “complete victory.” (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109 (*Scott Co.*); see *Jackson v. Homeowners Assn. Monte Vista Estates–East* (2001) 93 Cal.App.4th 773, 788 [trial court did not abuse its discretion in awarding attorney’s fees to plaintiffs where there was not a “clear win by either side” and “substantial arguments” supported both sides claims of victory].) Given that Gambord Trust Properties obtained a net money judgment against Galli Produce, we find the trial court’s ruling that Gambord Trust Properties recovered greater relief in this contract case, and was therefore the prevailing party within the meaning of section 1717, subdivision (b)(1), was within the court’s discretion. (See *Scott Co., supra*, at p. 1109.)

⁵ Section 1717, subdivision (b)(1) provides: “The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.” Section 1717, subdivision (b)(2) provides: “Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.”

Galli Produce's reliance on several appellate decisions for the contrary conclusion that "case law does not preclude a split award of attorney's fees" is misplaced. Although Galli Produce asserts, correctly, that the decisions in *Butler-Rupp v. Lourdeaux* (2007) 154 Cal.App.4th 918 (*Butler-Rupp*) and *Presley v. Whelan* (1983) 146 Cal.App.3d 959 (*Presley*) stand for the proposition that attorney's fees cannot be awarded in a contract case on an interim ruling, those decisions do not aid Galli Produce.

In *Butler-Rupp*, the appellate court stated that "if a litigant successfully obtains reversal on appeal of an unfavorable summary judgment on a contract cause of action, he or she cannot collect an award of attorney fees under [section] 1717 until the case has been remanded, tried on the merits and reviewed on appeal, if an appeal is taken, because the party ultimately prevailing on the cause of action cannot be known with certainty until the case is at an end." (*Butler-Rupp, supra*, 154 Cal.App.4th at p. 928; *Presley, supra*, 146 Cal.App.3d at pp. 962-963 [same].) No interim ruling is at issue in the present case.

Galli Produce also relies on the decision in *Snyder v. Marcus & Millichap* (1996) 46 Cal.App.4th 1099 (*Snyder*) as standing for the rule that the parties may agree to "an award of fees on a successful partial appeal," which Galli Produce contends the parties did in this case by including the phrase "at trial or appeal" in the attorney's fees provision in their lease agreement. (*Id.* at p. 1104, fn. 1.) In *Snyder*, the appellate court rejected Marcus & Millichap's contention that it was entitled to its "attorney fees for the prior appeal, under the fee provision of a relevant contract between the parties, because Marcus & Millichap was the prevailing party on the partial appeal even though judgment was entered against Marcus & Millichap for compensatory damages." (*Id.* at p. 1101.) The *Snyder* court concluded that "[w]e affirm the judgment because we conclude Marcus & Millichap was not the overall prevailing party in the litigation." (*Ibid.*)

In dicta, the *Snyder* court stated, "If the parties wished to provide in their agreement for an award of fees on a successful partial appeal, they were free to do so."

(*Snyder, supra*, 46 Cal.App.4th at p. 1104, fn.1.) To the extent this dicta may be read as allowing the parties to agree to an award of attorney’s fees on a contract claim to a party that was not the “overall victor,” we observe that such a reading would be inconsistent with California Supreme Court authority. (See, e.g., *DisputeSuite.com, supra*, 2 Cal.5th at p. 977 [the party entitled to attorney’s fees in an action on a contract is the ultimate “overall victor”].)

Finally, Galli Produce contends that it is inequitable and against public policy to deny a request for attorney’s fees on appeal where, as here, the plaintiff brought an unsuccessful appeal seeking more damages than had been awarded at trial. According to Galli Produce, the trial court’s order denying its motion for attorney’s fees on appeal “promotes litigation as a party with a favorable judgment could continue to appeal without any consequences for attorney’s fees[.]”

In support of this contention, Galli Produce relies on the decision in *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218 (*Olen*). However, the decision in *Olen* does not stand for the proposition that equitable considerations will allow the trial court to award attorney’s fees on appeal to a party who won on appeal, but is not the “ultimate victor” in the contract case. (See *DisputeSuite, supra*, 2 Cal.5th at p. 977.)

The majority in *Olen*, discussing a former version of section 1717, ruled that “recovery of attorney fees based on contract” is not permitted “when the plaintiff voluntarily dismisses prior to trial.” (*Olen, supra*, 21 Cal.3d at p. 223; *Santisas, supra*, 17 Cal.4th at p. 602.) The court stated: “[W]e are satisfied that sound public policy and recognized equitable considerations require that we adhere to the prior practice of refusing to permit recovery of attorney fees based on contract when the plaintiff voluntarily dismisses prior to trial.” (*Olen, supra*, at p. 223.) In response to the decision in *Olen*, “the Legislature amended [section] 1717 to state, in subdivision (b)(2), that if ‘an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case,

there shall be no prevailing party for purposes of this section.’ ” (*Santisas, supra*, at p. 602.)

Our Supreme Court in *Hsu* addressed its language in *Olen, supra*, 21 Cal.3d at page 224, on which Galli Produce relies, “that ‘contractual provisions for attorney fees will not be inflexibly enforced’ and that ‘the form of the judgment is not necessarily controlling, but must give way to equitable considerations.’ ” (*Hsu, supra*, 9 Cal.4th at p. 877.)

The *Hsu* court clarified that “[w]e agree that *in determining litigation success*, courts should respect substance rather than form, and to this extent should be guided by ‘equitable considerations.’ For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective. [Citations.]” (*Hsu, supra*, 9 Cal.4th at p. 877.) More recently, our Supreme Court reiterated that “the trial court may not invoke equitable considerations unrelated to litigation success as grounds to deny fees under the statute. [Citation.]” (*DisputeSuite, supra*, 2 Cal.5th at p. 973.)

As we have discussed, “litigation success” refers to the party entitled to attorney’s fees in an action on a contract as the prevailing party, or in other words, the “overall victor.” (See *DisputeSuite, supra*, 2 Cal.5th at pp. 973, 977.) In this case, the trial court determined that with regard to litigation success, Gambord Trust Properties recovered greater relief on the parties’ lease agreement. We have found that the trial court’s analysis of litigation success, and therefore the court’s ruling that Gambord Trust Properties was the prevailing party within the meaning of section 1717, subdivision (b)(1), was within the court’s discretion. (See *Scott Co., supra*, 20 Cal.4th at p. 1109.) Following the direction of our Supreme Court in *Hsu, supra*, 9 Cal.4th at page 877, and *DisputeSuite, supra*, 2 Cal.5th at page 973, we determine that equitable considerations do not compel a different result.

For these reasons, we conclude that the trial court did not err in denying Galli Produce's motion for attorney's fees on appeal and granting Gambord Produce's motion to tax costs.

IV. DISPOSITION

The December 15, 2015 order denying Galli Produce's motion for attorney's fees on appeal and granting Gambord Trust Properties' motion to tax costs is affirmed. Each party is to bear its own costs on appeal.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.